Citation: *S. T. v. Minister of Human Resources and Skills Development,* 2014 SSTAD 327

Appeal No: AD-13-742

BETWEEN:

S. T.

Applicant

and

Minister of Human Resources and Skills Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Application to Rescind or Amend Decision

SOCIAL SECURITY TRIBUNAL MEMBER:	Valerie HAZLETT PARKER
HEARING DATE:	November 12, 2014
TYPE OF HEARING:	On the Written Record
DATE OF DECISION:	November 17, 2014

DECISION

[1] The Tribunal dismisses the application to rescind or amend the decision of the Appeal Division of the Social Security Tribunal (SST-AD).

INTRODUCTION

[2] On April 26, 2013 a Review Tribunal determined that a Canada Pension Plan disability pension was not payable to the Applicant.

[3] The Applicant sought leave to appeal this decision, which was refused by the SST-AD on August 8, 2014.

[4] On September 17, 2014 the Applicant brought this application to rescind or amend the decision of the SST-AD. The parties were invited to make written submissions. On November 6, 2014 the Applicant wrote that she had no further submissions to make. On November 7, 2014 the Respondent filed lengthy submissions with the Tribunal.

[5] The hearing on the issue of whether the Appellant has produced new material facts was conducted on the written record after the time to file submissions had expired.

ISSUE

[6] This Tribunal must decide whether the Applicant has presented new material facts such that the decision of the SST-AD should be rescinded or amended.

THE LAW

[7] According to 66(1)b) of the *Department of Employment and Social Development Act*, (DESD Act) the Tribunal may rescind or amend a decision given by it in respect of any particular application if: (b) (…) a new material fact is presented that could not have been discovered at the time of the hearing with the exercise of reasonable diligence.

[8] Prior to April 1, 2013, the *Canada Pension Plan* also provided for the reconsideration of a decision on the basis of new facts. The language of subsection 84(2) of *Canada Pension Plan* provided the following:

> 84. (2) The Minister, a Review Tribunal or the Pension Appeals Board may, notwithstanding subsection (1), on new facts, rescind or amend a decision under this Act given by him, the Tribunal or the Board, as the case may be.

[9] In interpreting subsection 84(2) of the Canada Pension plan, the Federal Court of Appeal has clearly enunciated a two-part test for evidence to be admissible as a "new fact":

> (1) It must establish a fact (usually a medical condition in the context of the *Canada Pension Plan*) that existed at the time of the original hearing but was not discoverable before the original hearing by the exercise of due diligence (the "discoverability test"), and
>
> (2) The evidence must reasonably be expected to affect the result of the prior hearing (the "materiality test");
>
> *Canada (Attorney General) v. MacRae*, 2008 FCA 82

[10] This two-part test developed by the Federal Court of Appeal is now reproduced in section 66 of the DESD Act when it refers to "new material fact" discoverable through the exercise of "reasonable diligence".

[11] Further, in the decision of *Carepa v. Canada (Minister of Social Development)* 2006 FC 1319, the Federal Court decided that an applicant must provide evidence of what steps were taken to find the new evidence, and why it could not have been produced at the time of the original hearing.

[12] Therefore, the Tribunal must determine if the alleged new evidence submitted by the Appellant with the original request to the Review Tribunal meets the "new material facts" test with regards to the Appellant's alleged disability as of the Minimum Qualifying Period (MQP) date.

EVIDENCE

[13] The Applicant did not present any new evidence in support of the Application.

SUBMISSIONS

[14] The Applicant submitted that the SST-AD decision should be rescinded or amended because:

a) The Applicant again repeated facts regarding her claim that were before the Review Tribunal and the SST-AD, including some of her testimony before the Review Tribunal;

b) The Review Tribunal decision's conclusion that the Applicant had adopted a disabled lifestyle made a mockery of her medical condition; and

c) The *Social Security Tribunal Regulations* provide that a decision maker may request further clarification from a party prior to making a decision and this should have been done by the SST-AD before refusing leave to appeal;

[15] The Respondent submitted that these documents are not new material facts because:

a) Subsection 66(1) of the DESD Act only provides for the rescission or amendment of a decision where new material facts are found;

b) The Applicant did not allege any new facts. The facts relied on in this Application were before the Review Tribunal when it made its decision;

c) The Applicant is seeking to re-litigate her claim as heard and decided by a Review Tribunal; and

d) There was no evidence presented that met the two-part test for new facts required by the legislation and case law;

ANALYSIS

[16] The Applicant must prove on a balance of probabilities that she has met the legal test for new material facts as set out above.

[17] The Respondent's submissions contained a detailed analysis of the legal test for new facts. This is a correct statement of the law. In this case, the Applicant recited facts that were set out in her original application for a CPP disability pension, were considered by the Review Tribunal and noted in its decision, and were again repeated in her application for leave to appeal to the SST-AD. The mere repetition of these facts, as tragic as they may be, does not make them new material facts under the DESD Act. They were clearly discovered before the SST-AD made its decision.

[18] In addition, the Applicant argued that before deciding whether to grant leave to appeal the SST-AD should have requested further clarification from the Applicant. While the *Social Security Tribunal Regulations* permit the SST-AD to request submissions or answer written questions, this is not mandatory. The SST-AD committed no error in not making such a request. In addition, the fact that this request was not made is not relevant to the determination of whether the Applicant has produced a new material fact under the DESD Act. Therefore this argument fails.

[19] Finally, the Applicant disagreed with the Review Tribunal's conclusion that she had adopted a disabled lifestyle. She did not present any new evidence to dispute this conclusion. Therefore, I am not persuaded that this argument presents any new facts as that term is defined in the DESD Act.

[20] The Respondent argued that the Applicant attempted to re-litigate her claim in the Application. While it appears that this may be the case for the reasons set out herein, I need not decide this issue.

CONCLUSION

[21] The appeal is dismissed for the reasons set out above.

Valerie Hazlett Parker
Member, Appeal Division